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THE CRIME OF ADULTERY.

THE trial of General George W. Cole for the murder of L. Harris Hiscox, which recently took place at Albany and resulted in the disagreement of the jury, was in some respects extraordinary, and gives rise to serious reflection. The parties were of the highest social standing. The accused had served with great distinction and usefulness in the Union army in the late war, having been promoted a number of times, and severely wounded. He is a brother of the United States Senator from California. The deceased was a prominent lawyer, who had occupied, with credit, several positions of political and pecuniary trust, and at the time of his death was a member of the Constitutional Convention of the State of New York, then sitting at Albany. Mrs. Cole, who was said to be the "*meritorious cause of action*," was of an old, wealthy, and influential family, and a woman of education, refinement, and social distinction. Her brother was also a member of the Constitutional Convention. The deceased had been the legal adviser and intimate friend of the accused.

The commission of the murder by the defendant was unquestioned. It occurred at a hotel in Albany, in the presence of several witnesses. The crime was characterized by some circumstances showing coolness and deliberation.

It appeared that the defendant, on his return from the war, having his suspicions excited, induced his wife to confess in writing, first, that during the husband's absence at the war, His-

cox had made repeated attempts to seduce her, which she claimed she had uniformly and successfully resisted, but which, through shame and fear of the effect on her husband, she had refrained from disclosing; and, by a subsequent statement in writing, that Hiscox had actually seduced her. Both statements were clearly dictated by Cole. After the procuring of these confessions, and the lapse of several days, during which time it was to be inferred from the evidence that he cohabited with his wife, and having meanwhile, although he owned and carried a pistol, purchased in addition a Derringer revolver, making especial inquiry as to the efficiency of the cartridges, he rode in company with his wife one hundred and fifty miles to Albany, with the avowed purpose of proceeding to Brooklyn, and there went with her to a hotel and took rooms. Then, going to the Stanwix Hall Hotel, he walked up to Hiscox, who was conversing with a friend, and, without the interchange of a single word, killed him by shooting him through the head with the Derringer revolver. After the commission of the act, he said to the bystanders that the dead man had been his bosom friend, but during his absence at the war had dishonored his wife.

In his opening at the trial, the defendant's counsel, who is perhaps the most adroit criminal lawyer at the New York bar, boldly and emphatically claimed an acquittal on the ground of justifiable homicide, quoting Scripture and twenty-eight adjudged cases, and expressly declaring that his client wanted no compromise verdict from the jury. He based his argument on the theory, that as the law metes out no punishment to the seducer, the injured man has a right to take the law into his own hands. He made no suggestion that his client was insane, but considerable evidence of insanity was adduced. The theory of insanity was founded by the physicians on the presumed effect of the incurable wounds and severe hardships which the prisoner had suffered in the war, on the chronic prostrate condition of his nervous system, and on the undoubted state of mental distress under which he labored at the time of the commission of the act; but it may be doubted whether, in the light of the counsel's opening address, and the conflicting evidence on the question of insanity, the jury placed any reliance on the idea that the accused was really not of mental responsibility. Of course, no proof of actual adultery was allowed to be given. The judge charged

strongly against the prisoner; but the jury, after being out more than twenty-four hours, standing equally divided, were unable to agree, and were discharged. It was understood that the six in favor of conviction were willing to consent to a verdict of manslaughter, but the other six would agree to nothing but acquittal. After their discharge, the six in favor of acquittal in a body paid a congratulatory visit to the counsel for the prisoner, and also to the prisoner in his cell. The result of the trial is presumed to be equivalent to acquittal.

May not this case, then, be added to the long line of precedents which have substantially established the rule, that a man may with impunity slay the person whom he suspects of having seduced his wife? and may it not also be hereafter cited as a precedent for the doctrine, that he may do this solely upon the warrant of the wife's confession?

This case, therefore, presents two very singular propositions. First, that one may lawfully kill another upon mere suspicion of grievance; and, second, that he may so kill him in a case where, even if his suspicion is well founded, and the offence has actually been committed, yet the offence is no legal justification for the revenge, and, with rare exceptions, has not been deemed by legislators of sufficient gravity to warrant any legal punishment of the person who commits it.

In other words, that private animosity may usurp the place of public justice, and society in this respect be reduced to elemental chaos; that a private individual may lawfully take the life of his fellow-being where society and the laws would have no right to take life, or even inflict the slightest punishment. Is there not in this idea something radically and startlingly wrong and horrible, and well designed to give pause for thought?

To countenance the individual in becoming, at his own option, the executor of established public laws, savors of a demoralized state of society; but to applaud the individual when he not only constitutes himself the executioner, but himself makes the law which he executes, is a distinguishing mark of a barbarous and lawless community. And when we add to this that the community has looked calmly and approvingly on this course for a hundred years of enlightenment and civilization, and still persists in neglecting or refusing to render that legally penal which in effect it has so long farmed out to private revenge, it is truly one of

those obstinate anomalies, the existence of which goes to justify th belief among the theologians in the doctrine of innate total de pravity, and in statesmen the despair of constructing a perfect political system.

In new and unsettled countries where laws exist but the executive power is weak, combinations of individuals have sometimes been temporarily tolerated for the purpose of preserving human life and property, but then only with great reluctance and debate, and for the shortest practicable period; and these departures from the ordinary procedure of civilized nations are regarded in the older and more settled communities with an extremely measured approbation, if not with positive disapproval. So great is the fear in conservative minds of possible injustice through hasty measures, excited passions, and the absence of legal forms, that the very name of "Vigilance Committee" raises the spirit of condemnation, and the query whether it is not better to "bear the ills we have, than fly to others that we know not of;" whether it is not better in the humane language of the law, that ninety-nine guilty should go unpunished than that one innocent should be harmed. And so these summary dealings have been tolerated only because they seemed unavoidable, very much as many arbitrary proceedings were justified during the late war by the plea of "military necessary." But in these same old and settled communities,—refined, educated, humane, Christian communities,—here in the state of New York, where we have been accustomed to regard human life as safe as human wisdom can make it, and the execution of laws as certain as human foresight can render it; where the excesses of the passions generated by a tropical sun, and the cheapness with which human life has seemed to be held in the Southern States of the Union have been so strongly and persistently reprobated; where legislators have had twenty-eight (now twenty-nine) solemn judicial warnings of the effects of neglected duty,—it seems yet, if we may judge from the defects of the statute-book, and the actual administration of law, to be the sentiment of the people, as it also seems the voice of the public press, that the individual is justified in deliberately taking the life of his neighbor for that which is in law no fault, no crime. With the exception of Massachusetts and Pennsylvania (so far as we know), adultery in the United States is nowhere judicially pro-

nounced a crime, but still is a full excuse for the taking of life by the private hand.

The omission in this particular is the more singular because we are so hedged and guarded on nearly every side by law. It is really curious to contemplate the number of things artificially unlawful. We have laws against almost every form of sumptuary excess and licentious and indecent conduct. It is against the law to utter a profane oath; to disturb the public quiet on Sunday; to sell intoxicating liquor without conforming to public requirements; to drive fast through the streets; to expose the person in public places; to commit "the abominable and detestable crime against nature." We have laws punishing infringements on the proper relations of the sexes. It is against the law to commit rape, or to seduce an unmarried female under promise of marriage, and, in a number of communities, to commit fornication. A man may be criminally punished under certain circumstances for saying that his neighbor has seduced a woman; but he cannot be legally punished for seducing that neighbor's wife. Adultery is not a crime within the law. Why not? It is conceded to be a most heinous offence against morals. It tends to corrupt the purity of descent; it outrages man's tenderest sensibilities; it is against human conscience and divine law. It so shocks the moral sense that the guilty parties, male and female, are ostracised and denounced as bitterly perhaps as if they had conspired to destroy life, because the offence, although not against the public safety, is yet a violation of what the people hold nearly as dear—decency aud decorum.

Again: How tender of human life is the law, at least in theory! Nearly every form of homicide and of violence, or risk of violence to the person of one's self or of another, is forbidden. It is against the law for a man to commit suicide, and criminal to assist one in taking his own life. It is unlawful for two men to agree to run the risk of killing one another in duel. It is forbidden to give a man a black eye, to maim him, to engage in a prize-fight, to fire a gun off in a crowded place. It is even illegal for Sam Patch to jump over Genesee Falls, or for Blondin to walk a tight-rope across the Niagara. The law even goes so far as to make provision for the protection of the mere germ of human life in the womb, in order to prevent the destruction of that which may possibly become a sentient being, and so we have laws

against striking a pregnant woman, against procuring abortions, and even against advising the pregnant woman to take medicines with that purpose. And it is not human life alone of which the law is in theory so tender, but it extends its protection over the brute creation, and forbids cruelty to animals. Mr. De Bergh, of New York, has spent his life in enforcing this latter class of laws, and deservedly obtains the admiration and thanks of his countrymen; and Hogarth proved himself even a greater philosopher than painter by depicting the growth of unrestrained brutality in the human heart in the "Four Stages of Cruelty."

But this same society, so careful of human and brute life; so averse to cruelty in every form; that sickens and grows faint at the sight or mere report of bloodshed; that feels a thrill of horror when the daily newspaper tells them that a thousand miles away some poor man is crushed out of existence by the whirling belt or the rushing railroad train; that shudders at the appointment of a judicial execution in its midst, and deafens the ear of the government with appeals for commutation or respite; that society yet deliberately and wilfully places the sword of vengeance in the hand of an infuriated wretch, and bids him work his reckless will on his brother who is supposed to have injured him; and after private vengeance is glutted, makes him the hero of the hour, and applauds the violation of law and justice. For this is the effect of the twenty-nine American precedents. When Cole killed Hiscox had he not a right to rely on the precedents, then twenty-eight in number? He clearly had, and they carried him through his ordeal.

It is hardly necessary to point out the dangers of allowing the individual to become the judge of his own wrong, and the executioner of the justice of his own imagination. In the cases under consideration there is room for gross mistake or corrupt conspiracy. It amounts simply to this: that one tells another to commit murder, and both are absolved from blame. A man is suddenly and violently sent to his grave, not only without any legal proof of his offending, but without any warrant for suspicion that he has offended, save a confession extorted from his alleged paramour, self-contradicted and at least as guilty as himself. Society will even pronounce the woman the more guilty, and yet sanction and applaud the husband, after his hands are washed of the victim's blood, in receiving the wife again to his bosom. It

does not require any stretch of imagination, nor is it outside the bounds of every-day possibility, to witness, under such conditions, the enacting of a tragedy more causeless and more piteous than Othello's. Given the ordinary passions of the human heart, the unrestrained rage of a jealous husband, and the fury of "a woman spurned," and we have the ready materials of the deepest woe and the most harrowing remorse.

In view of these things, we cannot escape the conviction, that Christianity and civilization have not yet effectually purged the tiger out of men. There still remains much to be done to obliterate the marks that distinguish barbarous from enlightened communities. There is frequently a feeling in the community that the administration of the laws is not severe enough. There is always a large class of unthinking persons ready to find fault if a criminal is allowed to go at large on bail, or if he receives a milder punishment than uninstructed public opinion would deem it just to inflict. Tribunals are denounced for not doing "substantial justice," in disregard of oaths, evidence, and the letter of the law. There is a frightful amount of this mob-spirit even among intelligent and reasonable citizens. But the remedy for the state of things complained of is legislation—not lynching. "Substantial justice" is certain oppression. The lamp-post and the paving-stone are unsafe instruments, and an enraged and howling crowd are unreliable ministers, of justice.

To advance everything that is humane and equitable should be the object of the law and the aim of legislators. Now, if there is an offence that in the opinion of society substantially justifies summary and deadly punishment at the hand of an injured citizen, why not make that offence a statutory crime, and visit upon both the participants the severe penalties of the law? This would be in accordance with the theory upon which, and the purposes for which, society is instituted, and would answer several useful ends. It would take away the excuse for private vengeance, which, if then indulged, would become in law as it is in morals a greater crime than that which instigates it. Society cannot be benefited by tolerating murder because of adultery. Two wrongs cannot make a right. But let law affix to the breast of the adulterer the "scarlet letter" of its condemnation, and if it does not diminish the amount of the one crime, it will at least restrain the commission of the other. It would also deal out a just

measure of punishment for the crime. If adultery is justly punishable by death, let the guilty parties die; but if it is not deemed deserving of so grave a penalty, then certainly it will not be affixed, and this in itself would be a striking evidence of the gross injustice of the present practice. Again, it would or should punish both the criminals. The woman, sinning against the natural purity of her sex, is the more blameworthy, especially where, as in the Cole case, she does so in spite of every artificial advantage of education and precept. In a state of refined society, if woman were impregnably pure, men could not thus sin. Once more, immunity from punishment is direct encouragement to crime. The possibility of active vice without retribution ought never to be tolerated in theory. In case of discovery, the husband might be restrained by Christian motives from the commission of unavailing violence, but if the law should promise to interpose its arm and surely crush the offenders, men would always hesitate, and sometimes turn aside. And, finally, it would teach the lesson which men are so loath to learn, that the object of punishment is not revenge, but correction. Vengeance belongs but to One. It is not for man to wield the thunderbolt of offended Divinity. This is the most solemn and weighty reflection in connection with the subject. It is an awful thing to take human life, even in pursuance of judicial decrees, and the act should be surrounded by all the sanctions of law, and conducted with dignity and order. It should be resorted to only in the last extremity, for the safety of aggregated mankind and as the most fearful example to offenders. How then can those Christian gentlemen who are opposed to capital punishment, both conscientiously and as matter of governmental policy, look so indifferently, or rather half approvingly, on these irresponsible murders which have so long stained the annals of jurisprudence?

We do not wish to prejudice the case of Cole. Perhaps he ought as matter of precedent to be acquitted. It would be better to let him go than to do him the remotest possible injustice. But when, under the shadow of the state capitol, a man who has come thither by the selection of his fellow-citizens, to advise in the reformation of the fundamental law of the Commonwealth, and in the correction of legal abuses, is boldly and defiantly murdered, and his murderer not only asks for acquittal but for the applause of society, and the murderer's counsel can success-

fully justify the act to the jury on the ground of a defect of law and justice, it is time that something were done to remedy such a palpable evil, and to end this line of ghastly precedents.

TROY, June, 1868.

RECENT AMERICAN DECISIONS.

Supreme Court of Connecticut.

CLARA HEWISON, ADMINISTRATRIX, *v.* THE CITY OF NEW HAVEN.

Any object in, upon, or near the travelled path of a highway which would necessarily obstruct or hinder one in the use of the way for the purpose of travelling thereon, or which from its nature and position would be likely to produce that effect, will, as a general rule, constitute a defect in the highway.

But those objects which have no necessary connection with the road-bed or relation to the public travel thereon, and the danger from which arises from mere casual proximity and not from the use of the road for the purpose of travelling thereon, will not, as a general rule, render the road defective.

Where a flag was suspended by private individuals across a public street of a city, with iron weights at the lower corners which were liable to become detached by the motion of the flag in the wind and to fall upon persons passing below, and one of the weights became detached in this manner and fell upon and injured a traveller on the highway who was in the exercise of reasonable care, it was *held*, that the city was not liable for the injury under the duty imposed upon it by law to keep the street "in good and sufficient repair."

An allegation of duty without stating the facts which raise the duty, is insufficient; and if the facts stated do not raise the duty alleged, the allegation of duty is immaterial.

ACTION on the statute "concerning highways and bridges," which gives a right of action for injuries received by means of any defective bridge or road against the town or other corporation which ought to keep the same in repair; brought by the plaintiff as administratrix of James Hewison, deceased, in the Superior Court in Fairfield county.

The declaration was as follows: "That on the 1st day of November 1864, a certain street and highway in said city of New Haven, and running through said city, known as Chapel street, which it was the duty of the defendants, under and by force of their said act of incorporation, to keep in good and sufficient repair and free from nuisances and obstructions which would endanger the safety of persons travelling thereon, at a place in